Supreme Court, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

No. 10-1020

In The Supreme Court of the United States

CONSOLIDATION COAL COMPANY, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND NEXCO IN SUPPORT OF PETITIONERS

Evelyn M. Suarez
Counsel of Record
WILLIAMS MULLEN
A Professional Corporation
1666 K Street, NW, Suite 1200
Washington, DC 20006
(202) 293-8116
esuarez@williamsmullen.com

Counsel for Amici Curiae

Dated: March 16, 2011

THE LEX GROUP DC • 1875 K Street NW • Suite 103 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. INTERESTS OF *AMICI CURIAE* 1

II. STATEMENT 3

III. SUMMARY OF ARGUMENT 4

IV. ARGUMENT 5

A. IF NOT REVERSED, *CONSOLIDATION COAL* WILL PROVIDE A BLUEPRINT FOR ADMINISTRATIVE AGENCIES AND CONGRESS TO CIRCUMVENT EXPORT-CLAUSE PROHIBITIONS 5

1. Vulnerabilities in Existing Statutes and Regulations Pave the Way for Further Impermissible Export Taxation Based on *Consolidation Coal* 6

a. *Consolidation Coal* Will Encourage Agencies to Promulgate and Interpret Regulations in Ways that Limit Statutory Exemptions, Until They Have Been Limited Out of Existence..... 7

b. *Consolidation Coal* Will Allow a Tax's Statutory Label, Rather Than its Regulatory Impact, to Determine Whether It Is an Impermissible Tax on Goods as Exports..... 10

c. *Consolidation Coal* Will Encourage Congress to Repeal Existing Statutory Exemptions or to Continue Enacting Export-Related Taxes without Providing Exemptions..... 12

2. Existing Excise Taxes Violating the Export Clause Demonstrate the Likelihood That the Government Will Tax Exports Further If This Court Does Not Close the Opening Created by *Consolidation Coal* 13

B. ECONOMIC RECOVERY NECESSITATES VIGILANCE AGAINST GOVERNMENTAL ACTIONS THAT WOULD IMPOSE ANY BURDEN ON EXPORTS 17

C. *CONSOLIDATION COAL* CREATES BUSINESS UNCERTAINTY BY THREATENING TO TAX EXPORTS 23

V. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

A.G. Spalding & Bros. v. Edwards,
262 U.S. 66 (1923) 7, 10, 11, 15

Consolidation Coal Co. v. United States,
615 F.3d 1378 (Fed. Cir. 2010) ..... *passim*

Fairbank v. United States,
181 U.S. 283 (1901) 7, 9

Matsushita Electric Indus. Co., Ltd v. Zenith Radio Corp.,
475 U.S. 574 (1986) 2

Princess Cruises v. United States,
22 C.I.T. 796 (1998) 7, 11

Ranger Fuel Corp. v. United States,
33 F. Supp. 2d 466 (E.D. Va. 1998) 7, 8

Thames & Mersey Marine Ins. Co. v. United States,
237 U.S. 19 (1915) 7, 9

United States v. Ford Motor Co.,
497 F.3d 1331 (Fed. Cir. 2007) 2

United States v. Gosho,
23 F.2d 675 (5th Cir. 1928) 7, 10, 15

United States v. Hvoslef,
237 U.S. 1 (1915) 7, 9

United States v.
International Business Machines Corp.,
517 U.S. 843 (1996) ..... *passim*

United States v. Mead Corp.,
533 U.S. 218 (2001) 2

United States v. U.S. Shoe Corp.,
523 U.S. 360 (1998) 6, 9, 11, 12

Vimar Seguros y Reaseguros, S.A. v.
M/V Sky Reefer,
515 U.S. 528 (1995) 2

CONSTITIONAL PROVISION

U.S. CONST. art. I, § 9, cl. 5 4

STATUTES

26 U.S.C.S. §§ 4001-5891 5

26 U.S.C.S. § 4001(a)(1) 6

26 U.S.C.S. § 4041(g)(3) 13

26 U.S.C.S. § 4051(a)(1) 6

26 U.S.C.S. § 4064(a) 6

26 U.S.C.S. § 4071(a) 6

26 U.S.C.S. § 4081(a)(1)(A)(iv) 6

26 U.S.C.S. § 4082(f)(2) 13, 15

26 U.S.C.S. § 4121 7

26 U.S.C.S. § 4121(a)(1) 6

26 U.S.C.S. § 4131(a) 6

26 U.S.C.S. § 4161 6

26 U.S.C.S. § 4181 6

26 U.S.C.S. § 4221(a)(2) ..... *passim*

26 U.S.C.S. § 4221(b) 14

26 U.S.C.S. § 4221(e)(2)(B) 14

26 U.S.C.S. § 4261(a) 14

26 U.S.C.S. § 4262 14

26 U.S.C.S. § 4272(b) 13

26 U.S.C.S. § 4371 ..... *passim*

26 U.S.C.S. § 4462(d) 6, 9, 11, 13

26 U.S.C.S. § 4611(b) 14

26 U.S.C.S. § 4661(a) 6

26 U.S.C.S. § 4662(e) 13

26 U.S.C.S. § 4671(a) 6

26 U.S.C.S. § 4681(a) 6

26 U.S.C.S. § 4682(d)(3) 13

26 U.S.C.S. § 5001(a)(1) 6, 23

26 U.S.C.S. § 5041(a) 6, 23

26 U.S.C.S. § 5051(a)(1) 6, 23

26 U.S.C.S. § 5053(a) 13, 23

26 U.S.C.S. § 5214(a)(4) 13, 23

26 U.S.C.S. § 5362(c)(1) 13, 23

26 U.S.C.S. § 5701 23

26 U.S.C.S. § 5701(a)-(g) 6

26 U.S.C.S. § 5704(b) 13, 23

26 U.S.C.S. § 5811(a) 6

26 U.S.C.S. § 5821(a) 6

26 U.S.C.S. § 5854 13

30 U.S.C.S. § 1232 7

30 U.S.C.S. § 1232(a) 8

RULE

Sup. Ct. R. 37.2(a) 1

REGULATIONS

26 C.F.R. §§ 46.4371-1 through 46.4374-1 8

26 C.F.R. § 48.4041-16(b) 16

26 C.F.R. § 48.4081-3(f)(2)(iii) 16

26 C.F.R. § 48.4121-1(c)(2) 9

26 C.F.R. § 48.4221-1(a)(2)(v) 16

26 C.F.R. § 48.4221-1(a)(2)(vi) 15

26 C.F.R. § 48.4221-1(b)(4)(ii) 16

26 C.F.R. § 48.4221-1(c)(1) 16

26 C.F.R. § 48.4221-1(c)(2) 16

26 C.F.R. § 48.4221-3(a)(1) 15

26 C.F.R. § 48.4221-3(b) 16

26 C.F.R. § 48.4221-3(c) 14

26 C.F.R. § 48.4221-3(d) 16

26 C.F.R. § 48.4221-3(e)(2) 16

26 C.F.R. § 48.4222(a)-1 16

26 C.F.R. § 48.4222(b)-1(b) 16

26 C.F.R. § 48.4221-7(c)(1) 14

26 C.F.R. § 48.6416(b)(2)-1 16

26 C.F.R. § 48.6416(b)(2)-2(a) 15

26 C.F.R. § 48.6416(b)(2)-2(b)(2) 16

26 C.F.R. § 48.6416(b)(2)-3 16

26 C.F.R. § 48.6416(b)(2)-4 16

26 C.F.R. § 48.6416(e)-1(a) 16

30 C.F.R. § 870.12(b) 8

30 C.F.R. § 870.13 8

OTHER AUTHORITIES

2 Farrand, Records of the Federal Convention 22

Black's Law Dictionary:
New Pocket Edition (1996) 5

Coal Production Fees and Fee Allocations,
69 Fed. Reg. 56,122, 56,128 (Sept. 17, 2004) 8

Export Promotion Cabinet and Trade Promotion Coordinating Committee, *Report to the President on the National Export Initiative: The Export Promotion Cabinet's Plan for Doubling U.S. Exports in Five Years* (Sept. 2010), http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf.....17, 18, 19, 20

H.R. 526, 112th Congress, § 3(b)(2)(A), http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.526.IH:..... 12

IRS, "Foreign Insurance Excise Tax—Audit Technique Guide," (Jan. 18, 2011), http://www.irs.gov/businesses/small/article/0,,id=186963,00.html..... 9

IRS Notice 2000-28, IRB 2000-21 (May 22, 2000), http://www.irs.gov/pub/irs-irbs/irb00-21.pdf..... 9

Office of the United States Trade Representative, *2011 Trade Policy Agenda and 2010 Annual Report of the President of the United States on the Trade Agreements Program* (March 2011), http://www.ustr.gov/webfm_send/2597 18

Pub. L. No. 109-59, 119 Stat. 1144, § 11116(a) 9

BRIEF *AMICI CURIAE*

The American Association of Exporters and Importers ("AAEI"), the National Association of Manufacturers ("NAM") and NEXCO hereby respectfully submit this brief *amici curiae* in support of the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit filed by Consolidation Coal Company *et al.* Pursuant to Rule 37.2(a), counsel of record received timely notice of our intention to file this brief, and all parties provided their written consent.[1]

I. INTERESTS OF *AMICI CURIAE*

Founded in 1921, AAEI is a national association that represents the entire spectrum of the international trade community across all industry sectors. Members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the international trading community such as customs brokers, freight forwarders, banks, insurers, transportation companies and ports. Many of these enterprises are small and medium-sized businesses seeking to export to foreign markets. Products manufactured or exported by AAEI member businesses include, among others, chemicals, pharmaceuticals, electronics, machinery, automobiles and automotive parts, energy, food, household consumer goods, toys, specialty items, textiles and apparel, and footwear.

---

[1] No party or entity other than *amici curiae* and its counsel authored this brief in whole or in part or made a monetary contribution intended to fund this brief's preparation or submission.

AAEI plays an important role in commenting on import and export regulation and trade facilitation matters in the international context. Congressional committees often call on AAEI to offer its technical expertise on policy and regulatory matters affecting global commerce. AAEI has also participated as *amicus curiae* in a number of cases involving issues of interest to its members in this Court, the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade.[2]

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

NEXCO, previously known as the National Association for Export Companies, is an international trade association that represents and educates its members, who include exporters, freight forwarders, importers, customs brokers, bankers, attorneys, accountants, and other international trade companies and professionals. NEXCO

---

[2] *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Matsushita Electric Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *United States v. Ford Motor Co.*, 497 F.3d 1331 (Fed. Cir. 2007).

members are primarily U.S. and multinational companies and entities of all sizes.

Amici represent groups well-positioned to articulate the interests of the trade community in this case, to provide the Court with a broad perspective as to the impact of *Consolidation Coal* on U.S. exporters and the U.S. economy, and to bring to the Court's attention relevant matter not already brought to its attention by the parties.

Consolidation Coal[3] is significant to *amici's* members because it threatens U.S. exporters. At a time of extreme federal budget deficits, the decision tempts the Executive and Legislative Branches to tax exports in contravention of the Export Clause. Ironically, this threat arises when the Administration seeks to double exports in five years to stimulate growth in the worst economic times since the Great Depression. *Amici* members, large and small, are seeking export markets to create jobs in the United States.

II. STATEMENT

Amici hereby adopt, without change, the Statement of the Case provided by the Petition of Consolidation Coal Company *et al.*

---

[3] *Consolidation Coal Co. v. United States*, 615 F.3d 1378 (Fed. Cir. 2010) (hereinafter "*Consolidation Coal*").

III. SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Consolidation Coal* disregards a century of this Court's jurisprudence, which has consistently upheld the Export Clause's absolute ban against any tax burden on exports.[4] Instead, the decision substitutes the much more lenient test under the wholly irrelevant governmental immunity doctrine, which bars only a narrow category of taxes imposing a "direct burden" on state government. This creates a considerable gap in the protection afforded export commerce by the Export Clause.

If *Consolidation Coal* is not reversed, its invitation and roadmap to tax exports will encourage administrative agencies and Congress to exploit weaknesses in existing statutes and regulations, by applying excise taxes to many currently exempt, exported articles. The urgency to raise revenues and defray a massive federal deficit will breed further defiance of the Export Clause, through mischaracterization of statutory and regulatory language, and the passage of statutes and promulgation of regulations that violate the Clause outright. The result not only threatens the national economic recovery plan but also seriously jeopardizes the health and, indeed, the very survival of thousands of small and medium-sized U.S. businesses viewed as key to U.S. economic growth.

---

[4] U.S. CONST. art. I, § 9, cl. 5.

IV. ARGUMENT

A. If Not Reversed, *Consolidation Coal* Will Provide a Blueprint for Administrative Agencies and Congress to Circumvent Export-Clause Prohibitions.

Historically, many federal taxes have tested—and often violated—the Export Clause. Excise taxes, imposed by means of Subtitles D and E of the Internal Revenue Code,[5] are an example. Generally, an "excise tax" imposes a monetary charge on "the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax)."[6] Although exemptions for export sales generally prevent the excise taxes from running afoul of the Export Clause, in some instances no exemption exists or regulations severely limit the scope of the exemption. Indeed, as discussed below, a bill introduced in Congress just last month would tax exports in violation of the Export Clause. The Federal Circuit's decision in *Consolidation Coal* expands the opportunity for such unlawful governmental action to continue and grow at the expense of U.S. exports.

---

[5] 26 U.S.C.S. §§ 4001-5891 (2011).

[6] Black's Law Dictionary: New Pocket Edition 615 (1996).

1. Vulnerabilities in Existing Statutes and Regulations Pave the Way for Further Impermissible Export Taxation Based on *Consolidation Coal*.

Statutory wording of federal excise taxes varies considerably. Sometimes they tax the "sale" of an article, [7] while other times the article "sold," [8] and still other times the article "produced" or "manufactured."[9] In the case of firearms, three separate statutory provisions impose excise taxes on the "sale" of firearms, "firearms transferred" and the "making" of firearms.[10] This variety of language has historically enticed Governmental entities to impose excise taxes in a manner that violates the Export Clause.[11] If not again stopped by this Court, the

---

[7] *See, e.g.*, 26 U.S.C.S. §§ 4001(a)(1), 4051(a)(1), 4064(a), 4081(a)(1)(A)(iv), 4161 (2011) (imposing an excise tax on, respectively, certain: luxury passenger vehicles; heavy trucks and trailers; gas-guzzlers; motor and aviation fuels; sporting goods).

[8] *See, e.g.*, 26 U.S.C.S. §§ 4071(a), 4121(a)(1), 4131(a), 4661(a), 4671(a), 4681(a) (2011) (imposing an excise tax on, respectively, certain: tires; coal; vaccines; chemicals; imported substances; ozone-depleting chemicals).

[9] *See, e.g.*, 26 U.S.C.S. §§ 5001(a)(1), 5041(a), 5051(a)(1), 5701(a)-(g) (2011) (imposing an excise tax on, respectively, certain: distilled spirits; wines; beer; tobacco products and cigarette papers and tubes).

[10] 26 U.S.C.S. §§ 4181, 5811(a), 5821(a) (2011).

[11] *See, e.g.*, *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998) (finding unconstitutional the Harbor Maintenance Tax from 26 U.S.C.S. § 4462(d)); *United States v. International Business Machines Corp.*, 517 U.S. 843, 863 (1996) (finding unconstitutional, as applied to casualty insurance on exported cargo, the excise tax on insurance policies issued by foreign

Government is likely to extend its defiance, taking advantage of the *Consolidation Coal* blueprint.

a. *Consolidation Coal* Will Encourage Agencies to Promulgate and Interpret Regulations in Ways that Limit Statutory Exemptions, Until They Have Been Limited Out of Existence.

Consolidation Coal teaches agencies that by regulation they can impose a tax on goods in the

---

insurers from 26 U.S.C.S. § 4371) (hereinafter "*I.B.M.*"); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69-70 (1923) (finding unconstitutional a tax on baseball bats sold for exportation); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915) (finding unconstitutional the federal stamp tax on policies insuring exports against marine risks); *United States v. Hvoslef*, 237 U.S. 1, 16-18 (1915) (finding unconstitutional the federal stamp tax on charter parties exclusively to carry cargo from the United States to foreign ports); *Fairbank v. United States*, 181 U.S. 283, 291 (1901) (finding unconstitutional the federal stamp tax on bills of lading for exported articles); *United States v. Gosho*, 23 F.2d 675, 675-76 (5th Cir. 1928) (finding unconstitutional the taxation of costs to transport cotton by rail from interior Texas to Galveston); *Princess Cruises v. United States*, 22 C.I.T. 796, 796 (1998) (finding the Harbor Maintenance Tax unconstitutional as applied to the embarkation of international cruise passengers); *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998) (finding the Coal Excise Tax from 26 U.S.C.S. § 4121—frequently referred to as the Black Lung Excise Tax, not to be confused with the Coal Reclamation Fee from 30 U.S.C.S. § 1232 at issue in *Consolidation Coal*—unconstitutional as applied to exports, based on the "blanket prohibition imposed by the Export Clause and the Supreme Court holdings interpreting that clause").

export stream, as long as the regulation does not by its terms explicitly impose a "sales tax." The Federal Circuit decision further instructs that a sales tax exists only when the amount of tax varies as a function of the sales price. As a result, the Export Clause no longer protects against any taxes calculated based on unit measurements, *e.g.*, dollars per ton, gallon, *etc.*, no matter when the tax inflicts its damage, thereby opening a substantial gap in the full coverage intended by the Export Clause.[12]

A government agency can now issue regulations or otherwise tax exports by calculating the tax based on units of physical measurement. Under *Consolidation Coal*, this basis for calculation will never violate the Export Clause. In addition, an agency can limit its interpretation of tax on sale, thereby supporting a pretense that the agency is not denying even statutory exemptions from taxes on sale for export.[13] Although the Export Clause

---

[12] *See* 30 U.S.C.S. § 1232(a) (2010) (imposing fees on "coal produced"); 30 C.F.R. § 870.12(b) (July 1, 2010) (requiring fees to be "determined by the weight and value at the time of initial bona fide sale"); Coal Production Fees and Fee Allocations, 69 Fed. Reg. 56,122, 56,128 (Sept. 17, 2004) (amending the fees from 30 C.F.R. § 870.13 and applying them to subsequent sales, even if the coal to be sold had been extracted and stockpiled earlier).

[13] Moreover, even after a court has found that a specific tax violates the Export Clause, Congress usually does not bother to fix the statute, and the I.R.S. usually does not bother to fix its implementing regulations. *See, e.g.*, 26 U.S.C.S. §§ 4221(a)(2) and 4371 (2011) (still taxing, without exemption, respectively: coal, despite *Ranger Fuels*; certain policies issued by foreign insurers, despite *I.B.M.*); 26 C.F.R. §§ 46.4371-1 through 46.4374-1 (Apr. 1, 2009) (still providing no exemption for casualty insurance issued by foreign insurers on exported

prohibits every tax on export sales, not every tax that the Export Clause prohibits is a sales tax.[14]

---

goods); and 48.4121-1(c)(2) (Apr. 1, 2009) (still stating that "no exemptions" from the Black Lung Excise Tax exist on sales of coal "for export"). True, seven years after *U.S. Shoe*, Congress enacted a statutory exemption stating that the Harbor Maintenance Tax "shall not apply to any port use with respect to any commercial cargo to be exported from the United States." 26 U.S.C.S. § 4462(d) (2011); *enacted as* Pub. L. No. 109-59, 119 Stat. 1144, § 11116(a) (2005). More often, however, only an Internal Revenue Bulletin gives notice that a court decision has forced the Government to change its implementation of an excise tax to comply with the Export Clause. *See, e.g.*, IRS Notice 2000-28, IRB 2000-21 at 1116-17 (May 22, 2000), available at http://www.irs.gov/pub/irs-irbs/irb00-21.pdf (last visited Feb. 15, 2011) (stating that the Government would stop collecting the Black Lung Excise Tax on exports); IRS, "Foreign Insurance Excise Tax—Audit Technique Guide," (Jan. 18, 2011), available at http://www.irs.gov/businesses/small/article/0,,id=186963,00.html (last visited Feb. 21, 2011) (stating that the Government would not apply the Excise Tax on Policies Issued by Foreign Insurance to casualty insurance premiums paid to foreign insurers for coverage of exported goods in transit to foreign destinations).

[14] *See I.B.M.*, 517 U.S. at 863 (finding unconstitutional, as applied to casualty insurance on exported cargo, the excise tax on insurance policies issued by foreign insurers from 26 U.S.C.S. § 4371); *Thames & Mersey*, 237 U.S. at 27 (finding unconstitutional the federal stamp tax on policies insuring exports against marine risks); *Hvoslef*, 237 U.S. at 16-18 (finding unconstitutional the federal stamp tax on charter parties exclusively to carry cargo from the United States to foreign ports); *Fairbank*, 181 U.S. at 291 (finding unconstitutional the federal stamp tax on bills of lading for exported articles). Evidence that the agency uses an export sale to trigger the tax or to calculate the amount of the tax might be *sufficient* but is therefore not *necessary* to a determination that the tax violates the Export Clause. Rather, the controlling (*both* necessary *and* sufficient) issue is *when* the agency applies the tax, relative to *when* the export began. *See*

As shown below, the Internal Revenue Service ("I.R.S.") has already substantially narrowed the scope of statutory exemptions from excise taxes through rulemaking. After *Consolidation Coal*, the I.R.S. and other agencies will confidently go further and create additional holes in the exemptions until the exemptions disappear entirely and the Export Clause loses all practical effect.

b. *Consolidation Coal* Will Allow a Tax's Statutory Label, Rather Than its Regulatory Impact, to Determine Whether It Is an Impermissible Tax on Goods as Exports.

In adopting the government's position that the reclamation fee statute at issue taxes the coal's extraction, rather than its sale, the Federal Circuit in *Consolidation Coal* took a contrived and problematic approach. The court said an agency's regulation imposing the tax on the weight and value of the coal at the time of sale should be regarded as merely the "calculation" of a manufacturing tax whose collection is "deferred" until sale.

A.G. Spalding, 262 U.S. at 69-70 (finding unconstitutional a tax on baseball bats delivered to the carrier for exportation, because title passed at the moment of pick-up and because the bats had therefore already entered the export stream); *Gosho*, 23 F.2d at 675-76 (finding unconstitutional the taxation of costs to transport cotton by rail from interior Texas to Galveston, even though the cotton was not compressed and appropriated to particular export sales contracts until after it arrived in Galveston).

Such a precedent allows the government to mischaracterize any tax on exports as a deferred calculation of a manufacturing tax. The Federal Circuit ignores this Court's strict adherence to the principle that an Export Clause violation is determined by the "operation and effect" of the subject tax rather than its label.[15]

Whether the statute expressly targets the "sale" of an article, an article "sold" or even an article "produced," the tax can still, depending on its application by the agency, burden exports.[16] Calculating the amount due based on the article's weight at time of sale, its value at time of sale, and the tax rate at time of sale, and imposing liability and collecting the tax only if a sale occurs, regulations similar to those in *Consolidation Coal* tax an export sale, even if the statute does not refer to a sales tax *per se*.

---

[15] *See A.G. Spalding*, 262 U.S. at 69-70 (finding unconstitutional a tax on baseball bats sold for exportation).

[16] *See U.S. Shoe*, 523 U.S. at 363 (finding unconstitutional the Harbor Maintenance Tax from 26 U.S.C.S. § 4462(d) as applied to exported cargo, because the fee was imposed on an *ad valorem* basis and so did not fairly match the exporters' use of port facilities); *compare to Princess Cruises*, 22 C.I.T. at 796 (finding the Harbor Maintenance Tax unconstitutional as applied to the embarkation of cruise passengers).

c. *Consolidation Coal* Will Encourage Congress to Repeal Existing Statutory Exemptions or to Continue Enacting Export-Related Taxes without Providing Exemptions.

If this Court does not reverse *Consolidation Coal*, Congress will likely use it significantly to restrict or completely to remove existing tax exemptions for exports or to enact new taxes that lack such exemptions. Certain constituencies are begging Congress to rein in the burgeoning federal deficit. Others are asking Congress to find yet more cash for stimulating job-creation. The current historical moment sorely tempts the Government to ignore Export-Clause prohibitions—or at minimum further to dilute them.

Congress has already begun yielding to this temptation. A bill introduced in the U.S. House of Representatives on February 8, 2011 would subject *all* U.S. exports to a fee equaling ".075 percent of the value of the article that is subject to the fee or $500, whichever is less."[17] The bill ignores the Export Clause, as well as this Court's holding in *U.S. Shoe* and other cases. As explained below, the bill parallels certain other, previously enacted excise tax statutes that either still lack statutory exemptions (regarding coal, crude oil and policies issued by

---

[17] *See* H.R. 526, 112th Congress, § 3(b)(2)(A) (2011) (the "Our Nation's Trade, Infrastructure, Mobility, and Efficiency Act" or the "ON TIME Act"), available at http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.526.IH: (last visited Feb. 21, 2011).

foreign insurers) or provide exemptions but substantially limit their application (to a period no longer than six months after sale or a geography no closer than 225 miles beyond the international border).

2. Existing Excise Taxes Violating the Export Clause Demonstrate the Likelihood That the Government Will Tax Exports Further If This Court Does Not Close the Opening Created by *Consolidation Coal.*

The federal excise tax provisions generally contain express exemptions for export transactions;[18] Congress, however, has whittled away at the exemptions in a variety of ways. Sometimes, no such statutory exemption even appears.[19] For example, no statutory exemption applies to policies issued by foreign insurers to

---

[18] *See, e.g.*, 26 U.S.C.S. §§ 4041(g)(3), 4082(f)(2), 4221(a)(2), 4272(b), 4462(d), 4662(e), 4682(d)(3), 5053(a), 5214(a)(4), 5362(c)(1), 5704(b), 5854 (2011) (making not applicable to exports the excise tax imposed, respectively, on certain: special fuels; motor and aviation fuels; luxury passenger automobiles, heavy trucks and trailers, gas guzzlers, tires, vaccines, sporting goods; transportation of property by air; port use; chemicals; ozone-depleting chemicals; beer; distilled spirits; wine; tobacco products and cigarette papers and tubes; firearms).

[19] *See, e.g.*, 26 U.S.C.S. § 4371 (2011) (taxing certain policies issued by foreign insurers but providing no statutory exemption for policies insuring exported articles). The statute remains in effect even though this tax was invalidated in *I.B.M.*, 517 U.S. at 845.

protect exported articles from casualty.[20] In a few instances, a statute expressly subjects to the excise tax a particular type of exported article—namely, coal and crude oil.[21] And at times, a built-in statutory exception taxes certain exportations within the larger, generally exempted group.[22] For instance, the sale of a luxury automobile for export is exempt only if the vehicle leaves the United States within six months, and the cost of flying a person overseas by air is exempt only for those miles that the person flies after reaching a point 225 miles beyond U.S. borders.[23]

I.R.S. regulations further narrow the scope of the statutory exemptions, thereby diminishing the Export Clause even more. For example, one I.R.S. regulation provides that the general exemptions in 26 U.S.C. § 4221(a)(2) for exported luxury passenger automobiles, heavy trucks and trailers, gas guzzlers,

---

[20] *See id.*

[21] *See, e.g.*, 26 U.S.C.S. §§ 4221(a)(2), 4611(b) (2011) (subjecting to an excise tax, without exemption, exports of, respectively: coal; crude oil).

[22] *See, e.g.*, 26 U.S.C.S. §§ 4221(b) and 4221(e)(2)(B) (2011) (ceasing the 26 U.S.C.S. § 4221(a)(2) exemptions for exported luxury passenger automobiles, heavy trucks and trailers, gas guzzlers, tires, vaccines and sporting goods when, despite a demonstrated export sale, the manufacturer has not, within six months after the earlier of that sale or the article's initial shipment, received proof that the article has left the United States); 26 C.F.R. §§ 48.4221-3(c) and 48.4221-7(c)(1) (Apr. 1, 2009) (same); *compare to* 26 U.S.C.S. §§ 4221(b) and 4221(e)(2)(B) (2011) (authorizing the exemption's temporal limitation); 26 U.S.C.S. § 4262 (2011) (providing that an exemption from the 26 U.S.C. § 4261(a) excise tax on transportation of persons by air generally does not cover the first 225 miles of travel beyond U.S. borders).

[23] *See id.*

tires, vaccines and sporting goods "apply only in those cases where the exportation . . . is to occur before any other use."[24] Another regulation similarly shrinks the 26 U.S.C. § 4221(a)(2) exemptions by arbitrarily restricting the number of steps that an exempted exportation may include: "An article may not be sold tax free under the provisions of this section by a manufacturer to a purchaser for resale to a second purchaser which does not intend to export the article itself but plans to resell it to a third purchaser for export."[25]

All these laws contradict a specific finding of this Court in *A.G. Spalding*: "The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result."[26] Once an exported article is in transit and exportation has begun, no federal tax may impose burdens that ignore the time it can take an article to exit U.S. borders and an exportation to end.

Other, similarly random regulatory preconditions accompany specific tax exemptions. For instance, should an export sale of motor and aviation fuels occur as they are delivered into a transport vessel, the excise tax exemption from 26 U.S.C. § 4082(f)(2) applies only if, among other

---

[24] 26 C.F.R. § 48.4221-1(a)(2)(vi) (Apr. 1, 2009); *compare to* 26 C.F.R. § 48.6416(b)(2)-2(a) (Apr. 1, 2009) (same).

[25] 26 C.F.R. § 48.4221-3(a)(1) (Apr. 1, 2009).

[26] *Id.*, 262 U.S. at 69-70; *compare to Gosho*, 23 F.2d at 676 (stating, "The temporary stoppage at Galveston for sorting and compression was reasonable and necessary for transshipment, in order to enable the cotton to reach its destination, and cannot be considered as interrupting the export movement").

things, "[t]he vessel has a capacity of at least 20,000 barrels of fuel."[27] Should an exporter sell vaccine to the U.S. Government for use abroad, the 26 U.S.C. § 4221(a)(2) exemption applies only if, among other things, the Government gives notice that it intends to use the vaccine other than to vaccinate U.S. citizens serving the U.S. Government outside the United States.[28] Moreover, even when an exemption from excise taxes does apply, the exporter who has paid the tax and then sought a refund must, by regulation, forego any interest on the refund that results.[29]

In the shadow of these regulations lurk many onerous related evidentiary requirements, whereby the I.R.S. has further shrunk statutory exemptions and eroded the Export Clause.[30] These regulatory

---

[27] 26 C.F.R. § 48.4081-3(f)(2)(iii) (Apr. 1, 2009).

[28] *See* 26 C.F.R. §§ 48.4221-1(a)(2)(v), 48.4221-3(c)(2) and 48.6416(b)(2)-2(b)(2) (Apr. 1, 2009) (providing for a "cessation of exemption" in certain circumstances)

[29] *See* 26 C.F.R. §§ 48.6416(b)(2)-1 and 48.6416(c)-1(a) (Apr. 1, 2009) (regarding "overpayments of tax" on certain exportations).

[30] *See, e.g.*, 26 C.F.R. §§ 48.4041-16(b); 48.4221-1(c)(1) and 48.4222(a)-1; 48.4221-1(c)(2), 48.4221-3(b), and 48.4222(b)-1(b); 48.4221-1(b)(4)(ii); 48.4221-3(d); 48.6416(b)(2)-3 and 48.6416(b)(2)-4 (Apr. 1, 2009) (requiring, respectively: a retailer selling special fuels for export to obtain documentary proof from carriers, foreign customs officers or foreign consignees; certain U.S. purchasers to register and to furnish sellers with timely written notice of purchasers' registration numbers and their intentions with regard to exportation; certain foreign purchasers to provide sellers with timely written evidence that articles will be transported to a foreign destination before further use; manufacturers to inform purchasers that exportation triggers a tax exemption and purchasers to inform manufacturers if articles are diverted

requirements undercut Export Clause prohibitions and foster more unconstitutional regulatory activity, which the Government can now expand using misjudgments from *Consolidation Coal*.

B. Economic Recovery Necessitates Vigilance Against Governmental Actions That Would Impose Any Burden on Exports.

The current economic environment amplifies the injury that will be suffered if *Consolidation Coal* is permitted to stand and to limit the protections of the Export Clause. In his 2010 State of the Union address, President Obama committed the Government to work with U.S. companies and help American-made goods and services succeed in global markets with the aim of doubling U.S. exports in five years. According to a September 2010 report to the President from the Export Promotion Cabinet and the Trade Promotion Coordinating Committee (the "Report"), the National Export Initiative ("NEI") is a key component of the President's plan to help the "United States transition from the legacy of the most severe financial and economic crisis in generations to a sustained recovery."[31] This importance was

---

from the export stream; U.S. and foreign purchasers to furnish sellers with timely, acceptable proof of actual exportation; refund claimants to make certified statements regarding the articles involved, to submit and retain supporting evidence, and to obtain certifications from ultimate purchasers and vendors).

[31] Export Promotion Cabinet and Trade Promotion Coordinating Committee, *Report to the President on the National Export Initiative: The Export Promotion Cabinet's Plan for Doubling U.S. Exports in Five Years* at 1 (Sept. 2010), available at

reiterated in the March 2011 Trade Policy Agenda issued by the United States Trade Representative.[32] As the Report explains, export growth is needed for various reasons, including:

- *The size of and potential growth in the consumer market outside the United States.* According to the Report, "95 percent of the world's customers lie outside the United States."[33] The International Monetary Fund predicts that "nearly 87 percent of world economic growth over the next five years will take place outside of the United States."[34] U.S. businesses' ability to tap into this growth abroad will be critical to the stability and prosperity of the U.S. economy going forward.[35] Thus, exports will play a vital role in creating strong, sustainable economic growth.[36]

- *The current importance of exports to the U.S. economy.* Exports have represented over ten percent of Gross

---

http://www whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf (last visited Mar. 1, 2011) ("NEI Report").

[32] Office of the United States Trade Representative, *2011 Trade Policy Agenda and 2010 Annual Report of the President of the United States on the Trade Agreements Program* at 1 (March 2011), available at http://www.ustr.gov/webfm_send/2597 (last visited Mar. 4, 2011).

[33] NEI Report at 1.

[34] *Id.* at 11.

[35] *See id.*

[36] *See id.* at 8.

Domestic Product ("GDP") annually since 1994 (averaged over the period), rising to a high of nearly 13 percent in 2008.[37] While exports fell during the recession, they have been instrumental in the recovery, contributing "more than one percentage point to GDP growth (at an annual rate)" in each of the quarters of recovery and "over 1.5 percentage points to growth in the last year" (more than either consumption or fixed investment).[38] Moreover, since 1994, exports have supported over seven million jobs each year, with their most significant impact in 2008, when they supported over 10 million jobs.[39] Manufacturing relies particularly heavily on exports, with exports supporting "over a third" of the jobs in that sector.[40] Exporting also improves productivity and increases wages.[41] As the United States increases exports successful companies grow and are better equipped to focus U.S. production in areas where American workers excel and can earn higher wages.[42]

---

[37] *See id.*
[38] *Id.* at 10.
[39] *See id.* at 9.
[40] *See id.* at 2.
[41] *See id.*
[42] *See id.*

- *The numerous obstacles companies currently must overcome to export.* Information about exporting and market research is not readily available.[43] Companies also frequently face financial hurdles. First, they struggle to obtain export financing. Then, they face strong financial competition from both foreign companies and foreign governments.[44]

- *The importance of small and medium-sized enterprises ("SMEs") to the U.S. economy.* SMEs "account for about half of all employment and economic activity in the United States."[45] They comprise 97% of all identified exporters and account for 31% of total export value.[46] The obstacles highlighted above are magnified for SMEs, whose resources are already limited.[47] The costs of exporting, particularly the substantial initial costs, tend to have a disproportionate effect on SMEs.[48] SMEs are therefore a key part of the Administration's export plans.[49]

If permitted, taxation of exports will serve as yet another obstacle for U.S. exporters to overcome. The

---

[43] *See id.*
[44] *See id.*
[45] *Id.* at 10.
[46] *See id.*
[47] *See id.* at 11.
[48] *See id.*
[49] *See id.* at 5.

fragile national economic recovery necessitates heightened vigilance against decisions, such as *Consolidation Coal*, that undermine Export Clause protections. *Consolidation Coal* gives the government the latitude to tax goods, as long as the tax is not imposed on the sale itself or based on the sales price. Such attempts to dilute the protections of the Export Clause must not be permitted.

In *I.B.M.*, this Court firmly rejected the government's attempt to narrow the sweeping protections of the Export Clause.[50] Summarizing the history of the Export Clause, the *I.B.M.* Court emphasized the depth and breadth of the Clause's prohibitions:

> As a purely historical matter, the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South. . . . The Government argues that this "narrow historical purpose" justifies a narrow interpretation of the text and that application of § 4371 to policies insuring exports does not conflict with the policies embodied in the Clause. . . . While the original impetus may have had a narrow focus, the remedial provision that ultimately

[50] *Id.*, 517 U.S. 843, 845-46 (1996).

> became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language. *See, e.g.*, 2 Farrand, Records of the Federal Convention, at 220 (Mr. King: "In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed"); *id.*, at 305 ("Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports"); *id.*, at 360 (Mr. Elseworth *[sic]*: "There are solid reasons agst. Congs taxing exports"); *ibid.* ("Mr. Butler was strenuously opposed to a power over exports") *id.*, at 361 (Mr. Sherman: "It is best to prohibit the National legislature in all cases"); *id.*, at 362 ("Mr. Gerry was strenuously opposed to the power over exports").[51]

As the Framers recognized, only an absolute prohibition against taxes on exported articles will be sufficient to protect them. If any burden is imposed on such goods, the damage is done. Thus, the Export Clause cannot permit exceptions for taxes that are not sales taxes or that are imposed on a unit measurement of the goods rather than their sales price.

---

[51] *Id.*, 517 U.S. at 859-60 (certain citations omitted, emphasis added).

C. *Consolidation Coal* Creates Business Uncertainty by Threatening to Tax Exports.

The *Consolidation Coal* decision creates confusion in how excise tax statues will be interpreted, leading to uncertainty for businesses. Following *Consolidation Coal*, Congress may rework existing excise tax statutes in an effort to evade the Export Clause prohibition. Congress could change references from "sale of X" or "X sold" to "X produced," the language used in *Consolidation Coal*. As discussed earlier, however, *Consolidation Coal* blurs the distinction between "sale" of articles, articles "sold" and articles "produced," leaving open the possibility that a court could find a tax in any of the three categories to be a pre-exportation event.

Further complicating the situation for businesses, Congress's past actions indicate it has not espoused the same interpretation as the court in *Consolidation Coal*. Congress has previously inserted export exemptions into excise tax statutes even when they target "X produced" or "X manufactured."[52] To whatever extent adherence to the Constitution's prohibition against taxation of exports may have motivated Congress, such exemptions imply that, in Congress's view, the

---

[52] *Compare* 26 U.S.C.S. §§ 5001(a)(1), 5041(a), 5051(a)(1), 5701 (2011) (imposing an excise tax on, respectively, certain: distilled spirits; wines; beer; tobacco products and cigarette papers and tubes) *and* 26 U.S.C.S. §§ 5053(a), 5214(a)(4), 5362(c)(1), 5704(b) (2011) (making *not* applicable to exports the excise tax imposed, respectively, on certain: beer; distilled spirits; wine; tobacco products and cigarette papers and tubes).

corresponding excise taxes would likely violate the Export Clause without them.

V. CONCLUSION

Whichever strategy the Government adopts after *Consolidation Coal*, the Government will in fact be taxing export sales by pretending that the Government is merely "collecting" at time of sale certain taxes "incurred" at time of manufacture. *Consolidation Coal* therefore not only ignores the Export Clause but also sets off an immediate peril that further unconstitutional action by the Government will burgeon. Even before *Consolidation Coal*, periodic Governmental overreaching has tested the Export Clause in the context of federal excise taxes. In every instance, only court action has halted the Government's attempts to weaken Constitutional limits.

The Federal Circuit's *Consolidation Coal* decision:

- Merits review because the decision violates the Export Clause and contravenes the Court's previous cases interpreting the Export Clause;

- Encourages both the Executive and the Legislative Branches, desperately seeking revenues that might combat massive deficits, to create loopholes in laws and regulations that contravene the Constitutional prohibition against taxing exports; and

- Threatens to injure exporters, especially small and medium-sized ones, at a time when the U.S. economy can ill afford any additional harm.

Therefore, this Court should grant the Petition of Consolidation Coal Corporation *et al.* for Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

Evelyn M. Suarez*
* Counsel of Record
WILLIAMS MULLEN
A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, DC 20006
(202) 293-8116
esuarez@williamsmullen.com

Counsel for Amici Curiae

March 16, 2011